Supreme Court, U.S.
FILED
APR 8 2003
CLERK

No. 02-1316

IN THE

Supreme Court of the United States

DOUGLAS A. MAULER and JUDITH A. MAULER,

Petitioners,

v.

BAYFIELD COUNTY, a political subdivision of the State of Wisconsin,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

RICHARD K. NORDENG
Counsel of Record
BARBARA A. NEIDER
STAFFORD ROSENBAUM LLP
3 South Pinckney Street, Suite 1000
P.O. Box 1784
Madison, WI 53701-1784
(608) 256-0226

Counsel for Respondent

180054

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
RESPONSE TO QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	5
REASONS FOR DENYING THE PETITION	7
I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.	8
II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT GOVERNING RETROACTIVE APPLICATION AND IMPLIED REPEAL OF STATUTES.	9
III. THERE IS NO CONFLICT BETWEEN THE CIRCUITS AND THE HIGHEST COURTS OF SEVERAL STATES.	12
IV. THERE HAS BEEN NO "TAKING" OF LAND BELONGING TO THE MAULERS.	14
CONCLUSION	15

TABLE OF CITED AUTHORITIES

Page

Cases

Barney v. Burlington Northern R.R. Co., 490 N.W.2d 726 (S.D. 1992), *cert. denied*, 507 U.S. 914 (1993) 10

Delta Air Lines v. August, 450 U.S. 346 (1981) ... 2

King County v. Burlington Northern R.R. Corp., 885 F. Supp. 1419 (W.D. Wash. 1994) 11

Marshall v. Chicago & Northwestern Transp. Co., 31 F.3d 1028 (10th Cir. 1994) 12

Noble v. Oklahoma City, 297 U.S. 481 (1936) 8, 9

Northern Pacific Ry. Co. v. Townsend, 190 U.S. 267 (1903) 7, 8, 14

Phillips Co. v. Denver and Rio Grande Western R.R. Co., 97 F.3d 1375 (10th Cir. 1996 ..... 12, 13

Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) 13

Vieux v. East Bay Regional Park Dist., 906 F.2d 1330 (9th Cir. 1990) 11, 13

Cited Authorities

Page

United States Constitution

Fifth Amendment 3

Fourteenth Amendment 3

Article I, section 9, clause 3 1

Statutes

16 U.S.C. § 1248 ..... *passim*

16 U.S.C. § 1248(c)-(f) 1, 2

16 U.S.C. § 1248(c) ..... *passim*

28 U.S.C. § 1291 5

28 U.S.C. § 1331 ..... 4, 5

28 U.S.C. § 1346(f) 4

28 U.S.C. § 2201 4

28 U.S.C. § 2202 4

28 U.S.C. § 2409a 3, 4, 7

28 U.S.C. § 2409a(e) 7

Cited Authorities

Page

43 U.S.C. § 912 ..... *passim*

43 U.S.C. § 913 ..... *passim*

Other Authority

Cong. R. House 8046 (May 13, 1920) 10

RESPONSE TO QUESTIONS PRESENTED

The Maulers suggest in their introduction to the "Questions Presented" that the right of way at issue was "abandoned before October 4, 1988." This misstates the record. As explained in detail below (Section II), there has been no "abandonment" of the right of way, as that term is used in the applicable statutes. The Maulers' assertion that there has been an abandonment illustrates that the Maulers' case continues to be one in search of a theory, making it a poor candidate for consideration by this Court.

This case dealt with the application of well-settled law to land grants specific to the State of Wisconsin. It has no potential to "unsettle the title and ownership of more than 100,000 miles of railroad right of way," as the Maulers assert.

Each of the Maulers' Questions Presented is repeated below, followed by Bayfield County's response.

***Maulers' Question 1*:**

Does the National Trail System Improvement Act of 1988, Public Law 100-170, 102 Stat. 2281(1988), 16 U.S.C. § 1248(c)-(f) constitute a deprivation [of] private property without due process of law in violation of the U.S. Constitution, Amendment V or Ex Post Facto legislation in violation of Article I, section 9, clause 3 of the U.S. Constitution?

***County's Response*:**

At no prior stage in this case did the Maulers plead or argue that section 1248 was ex post facto legislation. Questions presented in a petition but not raised in the court

of appeals are not properly before this Court. *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981). In any event, it appears from the argument in the Petition that the Maulers do not actually question the constitutionality of section 1248, but rather claim that the statute was improperly applied to their situation. This argument raises no issue of national interest.

***Maulers' Question 2*:**

Is a railroad right of way created by a prior conveyance or by the General Right of Way Act of 1875 "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)" and therefore owned by the United States under the National Trail System Improvement Act of 1988, Public Law 100-170, 102 Stat. 2281 (1988), 16 U.S.C. § 1248(c)?

***County's Response*:**

Question 2 is unclear. Moreover, "ownership" of the railroad right of way by the United States has never been an issue.

***Maulers' Question 3*:**

Did the National Trail System Improvement Act of 1988 Public Law 100-170, 102 Stat. 2281 (1988), 16 U.S.C. §§ 1248(c)-(f) impliedly repeal the Act of March 8, 1922, ch. 94, 42 Stat. 414 (43 U.S.C. § 912) and the May 25, 1920, ch. 197, 41 Stat. 621 (43 U.S.C. § 913)?

***County's Response*:**

Question 3 raises no issue requiring review. There is no split between the circuits on the issue of whether 16 U.S.C. § 1248 repealed 43 U.S.C. § 912 or 43 U.S.C. § 913. Rather,

the circuit courts uniformly recognize the continued viability of 43 U.S.C. §§ 912 and 913, even after the enactment of 16 U.S.C. § 1248.

***Maulers' Question 4*:**

Is the conversion [of] an abandoned railroad right of way to a recreational trail a taking without just compensation contrary to the U.S. Constitution, Amendments V and XIV?

***County's Response*:**

Question 4 is overly general and cannot be answered as posed. The answer depends upon the nature of the right of way and the circumstances of the conversion, as is illustrated by the Seventh Circuit's decision in this case. The answer further turns on the application of well-settled law to the specific facts. Review by this Court therefore would not add to the development of the law.

***Maulers' Question 5*:**

Is an abutting landowner entitled to quiet title and just compensation against a local government claiming title to abandoned railroad right of way under the United States where the United States disclaims all right, title and interest in such right of way under the Quiet Title Act, 28 U.S.C. § 2409a?

County's Response:

Question 5 implies that the United States disclaimed its interest in the right of way *before* title to the right of way vested in Bayfield County. This implication is incorrect.

The United States disclaimed its interest only *after* title was vested in Bayfield County and *after* the United States had no further interest in the property. The disclaimer thus operated merely to clarify that the United States had no continuing interest in the litigation and could be dismissed as a party, which is what occurred.

STATEMENT OF THE CASE

Bayfield County has established a public snowmobile trail on a railroad corridor that it acquired in 1989 from the Chicago and North Western Railroad. After the trail was established, Douglas and Judith Mauler purchased property in Bayfield County upon which a portion of the trail is located. Expressly excluded from the land conveyed to the Maulers was the 100-foot wide railroad corridor. The railroad retained the corridor when it conveyed the adjoining land to the Maulers' predecessor in interest. It subsequently conveyed the corridor to Bayfield County.

For years, the corridor has been openly marked and used by the public for snowmobiling and other public highway purposes. Now the Maulers claim title to the corridor under Wisconsin law.

The Court of Appeals for the Seventh Circuit correctly ruled that federal law controls and that Bayfield County is the rightful owner of the land. The Maulers have no legal interest in the land, and never did.

The Maulers assert that jurisdiction in the district court was founded on 28 U.S.C. §§ 1346(f) and 2409a and that jurisdiction in the court of appeals was founded on 28 U.S.C. §§ 1331, 2201, and 2202. Petition at 9. This assertion is

incorrect. The district court's jurisdiction was based on 28 U.S.C. § 1331. *Mauler v. Bayfield County,* 204 F. Supp. 2d 1168, 1170 (W.D. Wis. 2001). The Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

Respondent Bayfield County respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 309 F.3d 997 (7th Cir. 2002).

STATEMENT OF FACTS

The land at issue was at one time public land owned by the United States. (R73, ¶ 1.) The United States granted the land to the State of Wisconsin by acts of Congress passed in 1856 and 1864 "for purposes of aiding in the construction of a railroad," including a rail line to Bayfield, Wisconsin. (R73, ¶ 4.) The granting language is particularly important. The 1856 Act granted to the State of Wisconsin:

> every alternate section of land designated by odd numbers for six sections in width on each side of [the railroad to be constructed]. . . . "that *the lands hereby granted shall be exclusively applied in the construction of that road* for which it was granted and selected, and shall be disposed of only as the work progresses, and the same *shall be applied to no other purpose whatsoever*. . . . [The lands granted to the State] shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other; and *the said railroads shall be and remain public highways for the use of the government of the United States*. . . ."

(Emphasis added.) (R73, ¶ 5.)

The same language is adopted by reference in the 1864 Act. (R73, ¶ 5.)

The grants were accepted and implemented by acts that the Wisconsin state legislature passed in 1856 and 1874 and by the issuance of a state patent to a railroad company in 1884.[1] (R73, ¶ 2.) The patent granted to the Railroad included section 35, Township 47, Range 6. The strip of land at issue is located in this section. (R73, ¶ 2.)

Thereafter, in November, 1884, the Railroad conveyed section 35 to a John Canfield by warranty deed, with the following reservation:

> The party of the first part [the Railroad], however, hereby expressly reserves unto itself, its successors and assigns forever, the right to occupy a strip of land 100 feet in width through, over, and across the premises granted as aforesaid, or any part thereof, the said strip to be included within two lines, each parallel with, and distant 50 feet from, the center line of the railway of the party of the first part, as the same is now constructed and operated, or as the same may hereafter be located, constructed and operated. . . .

(R73, ¶ 6.)

On May 25, 1989, the Railroad conveyed to the Bayfield County Snowmobile Alliance its reserved interest in the

---

1. That railroad company was the predecessor to the Chicago and North Western Transportation Company, one of the original defendants in this case. (R73, ¶ 3.) For convenience, the railroad companies are referred to collectively in this brief as "the Railroad."

property it had earlier deeded to John Canfield. (R73, ¶ 7.) The Alliance in turn conveyed the interest to the County on June 28, 1989. (R73, ¶ 7.) The County acquired its interest using public funds made available to it by the State of Wisconsin. (R73, ¶ 9.)

In 1994 and 1996, Douglas and Judith Mauler purchased property in section 35 in the Town of Keystone upon which a portion of the snowmobile trail is located. (R54, ¶ 6.) The 1994 deed conveyed a portion of section 35 to the Maulers, "Subject to and together with all easements, restrictions, reservations and exceptions as may constitute or otherwise affect the chain of title to said premises." (R73, ¶ 12.) A 1996 deed to the Maulers, for an additional portion of section 35, expressly conveyed the property described in that deed, "Less Rights of Way of Record." (R73, ¶ 12.)

On June 28, 2001, the Bureau of Land Management, on behalf of the United States, filed with the district court a disclaimer of interest in the strip of land at issue, as authorized by 28 U.S.C. § 2409a(e). (R48.)

Contrary to what the Maulers imply in their Petition, abandonment of the railroad line has never been declared or decreed by a court of competent jurisdiction or by an Act of Congress. (R73, ¶ 8.)

REASONS FOR DENYING THE PETITION

Review in this Court is unnecessary because the Court's prior decision in *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. 267 (1903) controls. There is no constitutional issue, no issue of the retroactive application of a law, and no issue

of a conflict between circuits or between the decisions of this Court and the courts of any state.

I. The Seventh Circuit's Decision Does Not Conflict With Relevant Decisions Of This Court.

Both the Seventh Circuit and the district court had no difficulty concluding that this case is controlled by *Townsend*. The grants by which the Railroad obtained the land at issue conveyed, in the parlance of *Townsend*, "a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." *Id.* at 271. Because the land grants retained a reversionary interest in the United States, federal law (not state law) controls the disposition of the lands. *See* 43 U.S.C. § 912 and 16 U.S.C. § 1248.

The Maulers assert that the Seventh Circuit's decision conflicts with this Court's decision in *Noble v. Oklahoma City*, 297 U.S. 481 (1936), and thus requires review. There is no conflict. A correct reading of *Noble* shows that it has no application to this case.

The issue in *Noble* was whether the federal acts involved there vested the railway with title to an interest in land (a right of way) which was subsequently abandoned. *Id.* at 487-88. If the acts at issue granted a present interest in land, the possibility arose that there would be a right of reverter to the United States upon abandonment by the railroad. The Court held that the legislation at issue "granted a franchise, authorized a taking upon compensation secured or made, and *was not a grant of land*." *Id.* at 494 (emphasis added). Therefore, there was no right of reverter and the lands at issue were not subject to section 912.

The grants at issue here clearly were land grants, making this case easily distinguishable from *Noble*.

II. The Seventh Circuit's Decision Does Not Conflict With Decisions Of This Court Governing Retroactive Application And Implied Repeal Of Statutes.

In their Petition, the Maulers argue for the first time that 16 U.S.C. § 1248(c) cannot be applied "retroactively" to their situation. They assert that section 1248(c), by its terms, applies "[c]ommencing upon October 4, 1988" and that the "strip of land traversing the petitioners' land was abandoned as a right of way as of July 3, 1986." Petition at 19. This timing, according to the Maulers, means that the law that applied to the strip was 43 U.S.C. § 912, not 16 U.S.C. § 1248(c). Under section 912, the County had one year after abandonment—which the Maulers say occurred on July 3, 1986—to establish a public highway on the strip. Because the County did not do so, the Maulers claim that the strip became the property of their predecessor in interest under state law as of July 3, 1987. Accordingly, so say the Maulers, the Seventh Circuit was wrong when it applied section 1248(c) retroactively, thus reviving the reversionary interest of the United States which had been extinguished in 1987.

The Maulers' retroactivity argument is based on a misstatement of the record. The strip of land at issue was not abandoned as a right of way as of July 3, 1986, as the term "abandoned" is used in sections 912 and 1248. The abandonment which triggers the need to establish a public highway within the specified time is an abandonment "declared or decreed by a court of competent jurisdiction or

by Act of Congress." 43 U.S.C. § 912. The National Trails System Improvement Act of 1988 incorporates this definition by referring to "a determination of abandonment or forfeiture, as provided under [43 U.S.C. § 912]."[2] 16 U.S.C. § 1248(c).

As the Maulers know, the absence of a declaration or decree of abandonment relating to the right of way at issue in this case is undisputed. *Mauler*, 204 F. Supp. 2d at 1172 ("It is undisputed that there has never been a formal declaration of abandonment by either an Act of Congress or a court of competent jurisdiction.") Indeed, the Maulers asked the district court to issue such a declaration or decree, but the court refused, on the grounds that the Maulers had no standing to make the request. *Id.* at 1180. On appeal to the Seventh Circuit, the Maulers did not challenge the district court's conclusion that there has been no declaration or decree of abandonment. *Mauler v. Bayfield County*, 309 F.3d 997, 1002 n.6 (7th Cir. 2002) ("In its brief, Bayfield County argues the Railroad never officially abandoned the railway corridor, so the United States' reversionary interest in the land never vested. This argument is not challenged on appeal by the Maulers. . . .").

The July 3, 1986 date cited by the Maulers as the supposed "abandonment" date is the date on which the State of Wisconsin Department of Transportation released its interest in the right of way. This, however, is not a judicial decree, nor is it an Act of Congress. It therefore does

2. Congress enacted this requirement because it did not want to leave the matter of abandonment to the unfettered discretion of the railroad companies or abutting landowners. *See* Cong. R. House 8046 (May 13, 1920), *quoted in Barney v. Burlington Northern R.R. Co.*, 490 N.W.2d 726, 731-32 (S.D. 1992), *cert. denied*, 507 U.S. 914 (1993).

not constitute a declaration or decree of abandonment, within the meaning of sections 912 and 1248. *Mauler*, 204 F. Supp. 2d at 1180.

Because there was no declared or decreed abandonment of the corridor, title to the corridor never vested in the Maulers' predecessor in interest by operation of section 912 and state law. Nor did title vest in the United States under section 1248(c). Rather, title to the corridor remained in the Railroad under federal law, and the Railroad was authorized by 43 U.S.C. § 913 to convey the corridor to a municipality (such as the County) for use as a public highway. The district court found that the County has established a public highway on the corridor. *Mauler*, 204 F. Supp. 2d at 1178-79. Upon establishment of a public highway, the contingent reversionary interest of the United States in the corridor was extinguished. *See Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1337 (9th Cir. 1990) ("Under the exceptions clause [in section 912], non-vested reversionary rights can be extinguished if a public highway is legally established within one year of a decree of abandonment or forfeiture. . . ."); *King County v. Burlington Northern R.R. Corp.*, 885 F. Supp. 1419, 1425 (W.D. Wash. 1994) (public highway may be established even before any declaration of abandonment). Accordingly, the County now owns the land. *Vieux*, 906 F.2d at 1342 (establishment of a public highway vested ownership of the right of way with the County).

On June 28, 2001, the Bureau of Land Management filed a disclaimer of interest on the part of the United States. (R48.) The Government's willingness to disclaim any interest is understandable given that its contingent reversionary interest was extinguished when the County established a public highway on the rail corridor before a formal declaration of abandonment.

In summary, because there has been no "abandonment" of the right of way, the Maulers' entire discussion of a retroactivity issue is irrelevant and warrants no further review.

The Maulers also suggest that 16 U.S.C. § 1248(c) implicitly "repealed" sections 912 and 913 prospectively from October 4, 1988. There was no repeal. Rather, section 1248(c) modified section 912 to the extent that a reversionary right to an *abandoned* railroad right of way falls to the United States, not the adjoining landowner. In any event, in the absence of a properly declared abandonment, this point is moot.

III. There Is No Conflict Between The Circuits And The Highest Courts Of Several States.

The Maulers assert that the Seventh Circuit's decision conflicts with *Marshall v. Chicago & Northwestern Transp. Co.*, 31 F.3d 1028, 1030 (10th Cir. 1994) and *Phillips Co. v. Denver and Rio Grande Western R.R. Co.*, 97 F.3d 1375 (10th Cir. 1996). To further stir the pot, they claim that *Phillips* conflicts with *Vieux*. Petition at 24-25. The Maulers again fail to recognize the factual distinctions that separate these cases from one another and from the present case.

Marshall involved a right of way which was declared abandoned by a decree entered by the district court. *Marshall*, 31 F.3d at 1031. There has never been such a decree or declaration in this case. *Mauler*, 204 F. Supp. 2d at 1080-81.

The court in *Phillips* held that authorization from the Interstate Commerce Commission to abandon a railroad line was a prerequisite to a court's determination that the railroad

had abandoned the right of way for purposes of section 912. 97 F.3d at 1377. There is nothing novel about this, nor does it conflict with any portion of the Seventh Circuit's decision in this case. Indeed, whether ICC approval was a prerequisite for abandonment was not even an issue in this case, where it is undisputed that there has been no declaration or decree of abandonment.

Finally, there is no conflict between *Phillips* and *Vieux*. Like the court in *Phillips*, the court in *Vieux* recognized that a railroad may abandon part of a rail line with the authorization of the ICC. Like *Phillips*, *Vieux* held that the ICC does not determine whether a right of way has been abandoned for purposes of section 912. Rather, abandonment must be declared or decreed by a court of competent jurisdiction or an Act of Congress. *Vieux*, 906 F.2d at 1338.

In summary, there is no relevant conflict between the circuits.

Finally, the Maulers assert that there is a conflict between the Seventh Circuit's decision and *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996). They claim that the Seventh Circuit adopted a "shifting public use doctrine" contrary to *Preseault* and to the law of the States of Vermont, Wisconsin and Washington.

The doctrine of shifting public use has no application here. *Preseault* involved *private* lands over which the railroad obtained an easement through a grant of the right of eminent domain. 100 F.3d at 1534-35. Significantly, there was no grant of *federal* lands to the railroad in *Preseault* and thus no issue of whether the United States had retained a reversionary interest in the land.

IV. There Has Been No "Taking" Of Land Belonging To The Maulers.

The Maulers contend that application of sections 912, 913 and 1248 to the present situation raises constitutional problems because, according to the Maulers, these sections authorize the taking of private property for public use without compensation. Not so. What happened in this case was that public property (public lands of the United States) was given for a private use (railroad) because to do so was deemed by Congress to be in the public interest to promote economic development. But the grant of public lands was not without restriction. The lands were given for the sole purpose of developing railroad rights of way over the public lands and those rights of way were to remain public highways for the use of the United States. Under the rationale of *Townsend*, these restrictions show the intent of Congress to retain a reversionary interest in the right of way if it should ever be abandoned. Sections 912, 913, and 1248 merely provide for the disposition of that interest. There was no taking of land from the Maulers because they never had any legal interest in the land.

CONCLUSION

For the reasons stated, respondent Bayfield County respectfully requests that the Court deny the Petition.

Respectfully submitted,

RICHARD K. NORDENG
Counsel of Record
BARBARA A. NEIDER
STAFFORD ROSENBAUM LLP
3 South Pinckney Street, Suite 1000
P.O. Box 1784
Madison, WI 53701-1784
(608) 256-0226

Counsel for Respondent